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No. 79-121

# In the Supreme Court of the United States

OCTOBER TERM, 1978

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UNITED STATES OF AMERICA, PETITIONER

*v.*

BILLY GALE HENRY

---

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

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# INDEX


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Question presented | 2 |
| Statement | 2 |
| Reasons for granting the petition | 9 |
| Conclusion | 14 |


## CITATIONS

Cases:


*Brewer* v. *Williams*, 430 U.S. 387 .....8, 10, 11
*Massiah* v. *United States*, 377 U.S. 201....6, 9, 10
*United States* v. *Luciow*, 518 F.2d 298.... 13
*Wilson* v. *Henderson*, 584 F.2d 1185 rehearing denied, 590 F.2d 408, cert. denied, No. 78-6610 (June 18, 1979).....9, 11, 12


Constitution, statutes and rule:


United States Constitution, Sixth Amendment ..... 9
18 U.S.C. 2113(a) ..... 3
18 U.S.C. 2113(b) ..... 3
28 U.S.C. 2255 ..... 5
Fed. R. Crim. P.:
Rule 12 ..... 10
Rule 12(b) ..... 10
Rule 12(c) ..... 10

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, la-24a) is reported at 590 F.2d 544. The memorandum order of the district court (App. D, *infra*, 27a-51a) is not reported.

## JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 25a) was entered on December 26, 1978. The gov-

ernment's petition for rehearing was denied on March 30, 1979 (App. C, *infra*, 26a). On June 14, 1979, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 28, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether respondent's right to counsel was violated by the admission of statements he made in the course of general conversation with a cellmate who had agreed to act as a government informant and had been instructed not to question respondent.

## STATEMENT

1. On August 28, 1972, the Janaf Branch of the United Virginia Bank/Seaboard National was robbed at gunpoint by two masked men who entered shortly after opening, as the bank's employees were processing the night deposits (Tr. 8-10, 35-36).[1] A bank employee observed the two men drive away in a tan Ford automobile with Virginia license BBL-373 (Tr. 38-39). The witness also observed a third man who had been waiting in the automobile (Tr. 40).

About an hour later, agents searching the area near the bank discovered the getaway car, which had been left illegally parked, with the doors ajar and the keys in the ignition (Tr. 72-74). When the agents searched the car, they discovered a rent receipt and a lease for a house on Wailes Avenue in Norfolk (Tr. 74-76). Shortly thereafter, two men subsequently

[1] "Tr." refers to the transcript of respondent's trial.



convicted of participating in the robbery were arrested at the rented house, where agents also discovered the proceeds of the robbery, as well as the guns and masks the robbers had employed (Tr. 78-82). Further investigation disclosed that respondent had rented the house on Wailes Avenue under an assumed name, and his palm print was identified on the copy of the lease found in the getaway car (Tr. 169-170, 182-185).

Respondent was indicted on charges of armed bank robbery, 18 U.S.C. 2113(a) and (d), and incarcerated prior to trial in the Norfolk City Jail (App. A, *infra*, 3a). Shortly thereafter Gerald Coughlin, an FBI agent who participated in the investigation of the Janaf bank robbery, contacted Edward Nichols. At that time, Nichols, who had previously acted as a paid FBI informant, was incarcerated in the Norfolk City Jail on local forgery charges (App. G, *infra*, 57a-58a). Nichols informed Coughlin that he was being held in the same cell block as various federal prisoners who were awaiting trial, including respondent (App. A, *infra*, 3a).[2] Agent Coughlin asked Nichols to be alert to any statements made by these individuals about the charges against them, but he specifically warned Nichols not to initiate conversation with or question respondent regarding the bank robbery (App. A, *infra*, 3a; App. G, *infra*, 58a, 60a). Nichols later in-

[2] Nothing in the record indicates that Coughlin contacted Nichols in order to gain evidence about petitioner's involvement in the Janaf bank robbery. To the contrary, Coughlin's statement suggests that he was not aware that respondent and Nichols were in the same cellblock until Nichols informed him of this fact (see App. G, *infra*, 58a-59a).

formed Agent Coughlin that respondent had engaged him in conversation, during the course of which respondent had described how the bank robbery had occurred (App. A, *infra*, 3a). The FBI paid Nichols for furnishing this information (*ibid.*).

2. Respondent was tried before a jury in the Norfolk Division of the United States District Court for the Eastern District of Virginia. Nichols testified, without objection, that respondent had admitted going to the Janaf bank prior to the robbery to see who opened the vault, that respondent had described the robbery to him, and that he had stated that the only thing the prosecution had connecting him to it was the rent receipt (Tr. 136, 138). Nichols also stated that federal agents had not requested him to ask respondent any particular questions (Tr. 135).

Joseph Sadler, who had also been respondent's cellmate, testified that respondent admitted to him that he had robbed a bank and hit one of the bank employees with a gun (Tr. 142). Sadler stated that he had informed the FBI of respondent's statements on the advice of his attorney (Tr. 143-144). The remainder of the government's evidence consisted of testimony identifying respondent as the person who had rented the house on Wailes Avenue under an assumed name (Tr. 182-185); the masks, guns, and money found in the rented house (Tr. 82-83); and evidence that respondent, again under an assumed name, had ordered parts for a police radio scanner found at the rented house (Tr. 154-159, 177-181).



Respondent was convicted and sentenced to imprisonment for a term of 25 years (Tr. 249). His conviction was affirmed by the court of appeals in a per curiam order, 483 F.2d 1401 (1973), and certiorari was denied, 421 U.S. 915 (1975).

3. On August 28, 1975, respondent moved to vacate his sentence pursuant to 28 U.S.C. 2255. Among other grounds for relief, respondent alleged for the first time that the introduction of Nichols' testimony violated his right to counsel.[3] The district court denied the motion without a hearing, and the court of appeals, in an unpublished order (App. F, *infra*, 54a-55a), remanded the case for an evidentiary inquiry to determine, *inter alia*, whether Nichols was acting as a government agent during his jail cell conversations with respondent.

On remand, Agent Coughlin submitted an affidavit (App. G, *infra*, 57a-60a) stating that Nichols had agreed to act as a government informant prior to his conversations with respondent and that Coughlin had instructed Nichols "not to initiate any conversations" with respondent regarding the charges against him, but "to pay attention" if respondent initiated any conversations with him. Coughlin stated (*id.* at 59a) that the FBI had paid Nichols for the information he furnished. Finally, Coughlin averred (*id.* at 59a-60a) that he had not requested that Nichols be placed in

[3] Respondent's pro se petition also alleged that the government had knowingly permitted the introduction of perjured testimony by Joseph Sadler, violated the court's pretrial discovery order, and failed to disclose exculpatory material, and that respondent's counsel had not rendered effective assistance.

respondent's cell, nor had he interceded with jail officials on Nichols' behalf.

After receiving Coughlin's affidavit and that of the other agent in charge of the Janaf bank investigation, the district court, without conducting any further evidentiary proceedings, again denied respondent's motion to vacate his sentence (App. D, *infra*, 27a-51a). The court concluded (App. D, *infra*, 39a) that this case was distinguishable from *Massiah* v. *United States*, 377 U.S. 201 (1964), because Nichols was not requested to question respondent or seek information from him, but only to report anything incriminating that he heard. The district court also noted that it credited the agents' statements that they had not intentionally placed Nichols in respondent's cell (App. D, *infra*, 39a). Alternatively, the district court held (App. D, *infra*, 39a-40a) that respondent had waived any objection he might have had to the admission of Nichols' testimony by his failure to object at trial. Finally, the court concluded that any error had been harmless (App. D, *infra*, 40a).

4. A divided panel of the court of appeals reversed and remanded with instructions that respondent be released from custody unless the government elected to retry him (App. A, *infra*, 1a-24a). The majority concluded (App. A, *infra*, 7a):

> If, by association, by general conversation, or both, [respondent] developed sufficient confidence in Nichols that [respondent] bared his incriminating secrets to an undisclosed paid informer, we think that there was interrogation within the meaning of *Brewer* [v. *Williams*, 430 U.S. 387 (1977)]. We hold therefore that [respondent's] right to counsel was violated when the government proved incriminating statements made to his cellmate after his indictment and in the absence of counsel.



Finding that the admission of Nichols' testimony could not be deemed harmless beyond a reasonable doubt, the majority reversed the judgment of the district court (App. A, *infra*, 7a-8a).[4]

Judge Butzner, who joined the majority opinion, also filed a concurring opinion stressing (App. A, *infra*, 9a) that "the informant's conclusory statement that he did not question the defendant is not determinative," because "[t]he critical issue is whether, after judicial proceedings had been initiated against the defendant, an informant—acting as an agent of the government—elicited information from him in the absence of defense counsel." Judge Butzner concluded (*ibid.*) that "absent testimony by the informant about what he said to [respondent], the judgment must be reversed because of the informant's admission that he had conversed with [respondent] and because of [re-

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[4] Neither the panel's opinion nor the concurring and dissenting opinions addressed the district court's ruling that respondent had waived this claim by his failure to object to Nichols' testimony at trial. On appeal, respondent contended (Reply Br. at 4 & n.5) that no waiver of this objection occurred at trial because respondent was unaware of the critical fact that Nichols was a paid government informant, and thus lacked the information necessary to assert his *Massiah* claim.

spondent's] assertion that the conversation was a form of questioning." [5]

Judge Russell dissented (App. A, *infra*, 10a-24a). He argued (*id.* at 10a) that *Massiah* and *Brewer* v. *Williams*, 430 U.S. 387 (1977), require "exclusion only when the challenged testimony is the result of 'interrogation.'" Quoting Justice Blackmun's dissenting opinion in *Brewer*, *supra*, 430 U.S. at 440, Judge Russell urged (App. A, *infra*, 12a; emphasis in original) that neither an informant's presence alone nor his listening constitutes interrogation: "The mere 'subjective desire to obtain information from a suspect after arraignment,' if unaccompanied by some affirmative action, either direct or subtle, reasonably *calculated to induce conversation relative to the crime*, will not satisfy the requisite of interrogation." Since "[t]he record indicates that [respondent's] incriminating statements were voluntarily and spontaneously given without any encouragement from Nichols," Judge Russell found (App. A, *infra*, 14a) that "there was no 'interrogation' of [respondent] by Nichols, however broadly that term may be defined." Moreover, *Brewer* established, in his view, that "whether the confession or damaging admission had been 'elicited surreptitiously' was 'constitutionally irrelevant'" (App. A, *infra*, 15a, quoting 430 U.S. at 400). Judge Russell also pointed out (App. A, *infra*, 21-24a) that on nearly identical facts

[5] Judge Butzner noted (App. A, *infra*, 9a) that the district judge's harmless error ruling was founded on the mistaken belief that there had been an eyewitness identification of respondent as one of the bank robbers.



the Second Circuit in *Wilson* v. *Henderson*, 584 F.2d 1185 (2d Cir. 1978), rehearing denied, 590 F.2d 408 (1979), cert. denied, No. 78-6610 (June 18, 1979), recently found that there had been no infringement of the Sixth Amendment right to counsel.

The government's petition for rehearing with suggestion of rehearing en banc was denied, with three judges dissenting (App. C, *infra*, 26a).

## REASONS FOR GRANTING THE PETITION

In *Massiah* v. *United States*, 377 U.S. 201 (1964), this Court concluded that statements obtained through interrogation, in the absence of counsel, of a defendant facing criminal charges could not be admitted at his trial without violation of the Sixth Amendment right to counsel. The proper application of the *Massiah* rule is of substantial importance in the context of inculpatory statements made by defendants while in jail awaiting trial. It is not uncommon for jail inmates—motivated by a desire for lenient treatment in their own cases, or by a prospect of monetary payments for information—to offer to report to authorities statements made by fellow inmates. It is imperative that police and prosecutors know the rules that govern the proper conduct of informants in such circumstances, and that courts understand the criteria governing the admissibility of informant testimony regarding such statements. As a result of the decision of the court of appeals in the present case, which conflicts with a recent decision of another court of appeals, the matter has been

thrown into considerable doubt. This case affords the Court an excellent opportunity to clarify this important area of constitutional law.[6]

1. Under the decision of the court of appeals, mere "association" or "general conversation" between cellmates apparently suffices to convert their exchange into "interrogation" within the *Massiah* proscription. This unprecedented conclusion is tantamount to a per se rule barring the admission of all statements made by a defendant to any fellow inmate who has agreed to act as an informant, even where the government has instructed the informant not to question the defendant.

The holding of the court of appeals is not supported by this Court's opinion in *Brewer* v. *Williams*, 430 U.S. 387 (1977), which succinctly summarized the holding in *Massiah*: "[T]he clear rule of *Massiah* is that once adversary proceedings have commenced

[6] As noted in the Statement, the district court based its denial of relief in part on the ground that respondent had waived his *Massiah* claim by his failure to object to the informant's testimony at trial. Respondent contended that he was unaware of the facts necessary to raise this claim until after trial. See note 5, *supra*. The court of appeals made no finding on the question whether Nichols' trial testimony was sufficient to alert respondent to the possible existence of this claim; indeed, its opinion does not discuss this issue at all. While we believe that respondent did waive his claim both by failing to object at trial and by failing to raise the issue on appeal, we do not present the issue for decision by this Court. The question is not of continuing importance in view of the amendments to Fed. R. Crim. P. 12, which took effect after respondent's trial and clarified the applicable standards for waiver (see Rules 12(b) and (f)).



against an individual, he has a right to legal representation when the government interrogates him" (*id.* at 401; footnote omitted). But "no such constitutional protection would have come into play if there had been no interrogation" (*id.* at 400). As the Court noted (*id.* at 399-400 n.6), the State had conceded that the "Christian burial speech," given to a deeply religious former mental patient over the course of several hours on Christmas Eve, constituted interrogation. And in his concurring opinion Justice Powell described the speech as "a skillful and effective form of interrogation" in a situation where "the entire setting was conducive to the psychological coercion that was successfully exploited" (*id.* at 412). Nothing in the Court's opinion suggests that mere "association" or "general conversation" constitutes interrogation.

2. Accordingly, on facts virtually identical to those in the present case, the Second Circuit recently held, in *Wilson* v. *Henderson*, 584 F.2d 1185, 1190-1191 (1978), that statements made by a defendant to a cellmate turned informant were not the product of an interrogation.[7] The court noted that Wilson's cellmate—like Nichols in this case—"had been specifically directed to refrain from questioning Wilson." 584 F.2d at 1190. The court contrasted the deliberate

[7] The petition for certiorari in *Wilson* v. *Henderson*, No. 78-6610, alleged that the Second Circuit's decision conflicts with the Fourth Circuit's decision in this case (Pet. 7, 9-10). However, the *Wilson* petition was jurisdictionally out of time (see Pet. 2); it was denied on June 18, 1979.

efforts in *Brewer* to elicit statements from the defendant by appealing to his religious convictions with the cellmate's function, which had been simply to listen to any statements Wilson might make (*id.* at 1191). The *Wilson* court found that, given the informant's instructions, there was no violation of *Massiah* (*ibid.*):

> The instructions to [the informant] suggest a conscious effort on [the investigating officer's] part to guard Wilson's constitutional rights while pursuing a crucial homicide investigation. His directions "Don't ask questions; just keep your ears open," suggest familiarity and attempted compliance with, not circumvention of, the principle of *Massiah*.

As the *Wilson* court correctly concluded, the behavior of the investigating agents in that case was wholly proper. That conclusion is equally applicable here. In both cases the agents instructed the cellmate who offered to act as an informant not to question the defendant about the offense or to initiate conversation on the subject, but to report any statements the defendant might volunteer. No "interrogation" resulted in either case.

The majority's conclusion that "association" or "general conversation" between cellmates constitutes interrogation is apparently founded on the court's concern about "the restrictive nature of the jailhouse setting" (App. A, *infra*, 5a). The court's underlying assumption—that a prisoner who has offered to act as an informant should avoid all association or general conversation with other prisoners—is unrealistic. A prisoner who has simply offered to relate incriminating statements he overhears should not be required to remove himself from all day-to-day association with his fellow prisoners, nor is it likely that he could do so without arousing their suspicion and perhaps even endangering himself. There is simply no legal basis for transforming mere day-to-day association or casual conversation about general topics into interrogation.



3. Although the agents have filed affidavits, no hearing was held on respondent's allegation that Nichols interrogated him. But as Judge Russell pointed out (App. A, *infra*, 13a-14a), the record developed to date "indicates that [respondent's] statements were voluntarily and spontaneously given without any encouragement from Nichols," and "[t]here is no evidence that Nichols in any way violated the instructions given him by the agent." In our view, even if Nichols had violated his instructions, it would not be correct to treat his actions as *government* interrogation. The situation would be essentially the same as if a fellow prisoner had asked these questions on his own motion, and only later agreed to act as a government informer. In neither case would the government have authorized the informant to question respondent, and neither case should be treated as government interrogation. Cf. *United States* v. *Luciow*, 518 F.2d 298, 300 (8th Cir. 1975).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1979



## APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 77-2338

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BILLY GALE HENRY, APPELLANT,

*v.*

UNITED STATES OF AMERICA, APPELLEE.

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Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, Chief Judge.

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Argued October 4, 1978 Decided December 26, 1978

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Before Winter, Butzner and Russell, Circuit Judges.

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Jim Moody, Third Year Law Student (Michael E. Geltner and Larry J. Ritchie, Professors, Georgetown

University Law Center, on brief) for Appellant; Roger T. Williams, Assistant United States Attorney (William B. Cummings, United States Attorney, on brief) for Appellee.

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WINTER, Circuit Judge:

After an unsuccessful appeal of his conviction for armed bank robbery in violation of 18 U.S.C. §§ 2113 (a) and (d), United States v. Henry, No. 73-1413 (4 Cir., Sept. 14, 1973) (unpublished), Billy Gale Henry moved to vacate his twenty-five year sentence pursuant to 28 U.S.C. § 2255. Among other grounds for relief, he claimed that, during his confinement after indictment and in the absence of counsel, incriminating statements were obtained from him by a cellmate acting as a government agent.[1] The district court denied the motion, and on appeal the case was remanded for an evidentiary inquiry. Henry v. United States, No. 75-2142 (4 Cir., Mar. 29, 1977) (unpublished). Affidavits submitted by the FBI agents in charge of the robbery investigation verified that one of Henry's cellmates was employed by the government to monitor Henry's statements. The district judge, nevertheless, again denied the motion to vacate. Because we conclude that Henry was denied

[1] The record is not clear as to whether, at the time the statements were obtained, counsel had been retained or appointed or whether the mere right to counsel had attached. The factual uncertainty is unimportant because the government does not dispute that Henry had *not* waived his right to counsel at the time of his conversations with his cellmate.



his right to counsel, we reverse and direct that the motion to vacate be granted and Henry released from custody on the charge unless the government elects to try him anew.

I.

Following his indictment on a charge of armed bank robbery, Henry was incarcerated in the Norfolk City Jail. Shortly thereafter, an FBI agent contacted Edward Nichols who was also an inmate at the Norfolk City Jail and who had been a paid informant of the FBI for over a year. Nichols advised the agent that Nichols was in the same cell block as Henry, as well as other federal prisoners awaiting trial. The agent then told Nichols to be alert to any statements made by these individuals about the charges against them. Nichols was specifically warned not to initiate conversation with or question Henry regarding the bank robbery.

When the agent contacted Nichols again a few weeks later, Nichols reported that Henry had engaged him in conversation, that Henry had talked about the bank robbery charges, and that he had described how the bank robbery had occurred. Nichols was paid by the FBI for furnishing this information.

At Henry's trial, Nichols testified that Henry had admitted going to the bank prior to the robbery to see who opened the vault and he further admitted renting the house indicated on the rental receipt found in the getaway car. According to Nichols, Henry had also described the actual robbery to him. Aside from Nichols' testimony, the case against Henry consisted

of: the testimony of another cellmate, Joseph Sadler, as to conversations in which Henry admitted robbing the bank; evidence that Henry, under an assumed name, rented the house where two of the three robbers, the money stolen, and the masks and clothes used in the robbery were found shortly after the crime; and evidence that Henry, again under an assumed name, ordered a crystal of the same frequency as one used in the police radio scanner found in the house where the two robbers were apprehended.

## II.

The sole issue presented in this case is whether the undisclosed government monitoring of Henry's conversations after his indictment, while he was in custody and had not waived his right to counsel, violated Henry's right to counsel under the sixth amendment. The resolution of this issue depends on the application of the rule established in Massiah v. United States, 377 U.S. 201 (1964).

In *Massiah*, a conversation between Massiah, who had been released on bail, and his co-defendant was recorded by government agents with the co-defendant's consent. During the conversation Massiah made incriminating statements which were later introduced at his trial. The Supreme Court reversed his conviction, holding that Massiah was denied the right to counsel when evidence was admitted "which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel." 377 U.S. at 206. The Court thought it inconsequential that Massiah was not confined at the time, for " 'if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse.' " *Id.*, *quoting* United States v. Massiah, 307 F.2d 62, 72 (2 Cir. 1962) (Hays, J., dissenting). There was no finding that any of the co-defendant's actions, aside from his mere presence, had induced the damaging remarks.[2]



Subsequently, several courts held that Massiah did not apply to all incriminating statements obtained by government agents after indictment and in the absence of counsel, but only to those statements *induced* by such agents. This refinement was summarily rejected by the Supreme Court in two per curiam opinions, McLeod v. Ohio, 381 U.S. 356 (1965), and Beatty v. United States, 389 U.S. 45 (1967). *McLeod* reversed a state court holding that *Massiah* was not applicable absent questioning or deception. Similarly, *Beatty* overturned the Fifth Circuit's determination that information volunteered to an unknown government informer was admissible despite *Massiah*. The facts of this case would be identical to those in *Beatty* except that Beatty was not in jail at the time of the interception. Because of the restrictive nature of the jailhouse setting, the instant case presents a far more compelling situation for the application of the *Massiah* rule.

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[2] The opinion of the Court of Appeals, however, indicated that the co-defendant had solicited information about the pending case. United States v. Massiah, 307 F.2d 62, 66 (2 Cir. 1962).

The government asserts that Brewer v. Williams, 430 U.S. 387 (1977), limited *Massiah* and its progeny to cases involving "interrogation." In *Brewer*, a police detective enticed the defendant, a former mental patient and deeply religious person, to reveal the location of his victims body by suggesting to the defendant that a predicted snowfall would preclude the Christian burial of the victim. Equating the "Christian burial speech" with "interrogation," the Supreme Court declared that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." 430 U.S. at 401. The Court noted, moreover, that there is no constitutional protection where no "interrogation" takes place. *Id.* at 400.

Notwithstanding the several references to "interrogation" in the *Brewer* opinion, we do not think that *Brewer* limits *Massiah* to cases in which the government has directly questioned the accused about his participation in crime. In the first place, the Supreme Court cited *McLeod, supra*, with approval, 430 U.S. at 400, in which *Massiah* was applied even though McLeod was not interrogated by the officers and he knew that they were officers. Secondly, "interrogation" is a relative term, and we agree with the Fifth Circuit in United States v. Anderson, 523 F.2d 1192, 1196 (1975), that it is not restricted to formalized oral interrogation. An undisclosed government agent may effectively "interrogate" a defendant by simply engaging the defendant in a general conversation



and if the response is a confession of guilt, the agent need not make any further more pointed inquiries. Miller v. California, 392 U.S. 616 (1968) (dissent from dismissal of certiorari).

In the instant case, even if we assume that Nichols obeyed his instructions not to interrogate Henry about the bank robbery, Nichols did testify that he engaged in conversation with his cellmate Henry. If, by association, by general conversation, or both, Henry developed sufficient confidence in Nichols that Henry bared his incriminating secrets to an undisclosed paid informer, we think that there was interrogation within the meaning of *Brewer*. We hold therefore that Henry's right to counsel was violated when the government proved incriminating statements made to his cellmate after his indictment and in the absence of counsel.[3]

III.

The district court found that, even if Henry's right to counsel was violated, admission of the incriminating statements was harmless error. While other evidence was introduced linking Henry to the robbery, we cannot say beyond a reasonable doubt that Nichols' testimony did not influence the jury's verdict. *See* Chapman v. California, 386 U.S. 18, 24 (1967).

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[3] We express no opinion about the interception of prisoners' conversations with non-government agents through electronic listening devices. *See* United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977), cert. denied, —— U.S. —— (1978), in which the Ninth Circuit held that such interception did not violate the sixth amendment under *Massiah*.

For these reasons, the judgment denying the motion under § 2255 is reversed, and the case is remanded with instructions that the motion be granted and Henry released from the charge against him unless the government elects to try him anew.

*REVERSED AND REMANDED.*

BUTZNER, Circuit Judge, concurring:

I concur in Judge Winter's opinion. I write briefly, however, to amplify my reasons for concluding that the judgment of the district court must be reversed.

In its opinion, the district court acknowledged the defendant's claim that the government's informant had questioned him in jail about the bank robbery. Nevertheless, the court denied an evidentiary hearing on this issue. Instead, it wrote:

> Here, the Court accepts the statements of the FBI agents that they did not request Nichols [the informant] to question Henry [the defendant] or engage him in conversation, but only to listen to any statement Henry might make within their [sic] hearing and report it to them. Nichols confirms this.

The informant denied questioning the defendant. He did not, however, fully comply with the instructions that he was not to "engage him in conversation, but only to listen." He admitted that he had "some conversations" with the defendant, but he did not divulge what he said to the defendant.



As Brewer v. Williams, 430 U.S. 387 (1977), demonstrates, the informant's conclusory statement that he did not question the defendant is not determinative. The critical issue is whether, after judicial proceedings had been initiated against the defendant, an informant—acting as an agent of the government—elicited information from him in the absence of defense counsel. Proof of formal interrogation is unnecessary to invoke the protection of the sixth amendment. A conversation that is tantamount to interrogation is sufficient. 430 U.S. at 397-401.

It would have been prudent for the district court to have conducted an evidentiary hearing to dispel the ambiguity of the documentary evidence, especially since the government did not reveal the substance of its paid informant's conversation. Nevertheless, absent testimony by the informant about what he said to the defendant, the judgment must be reversed because of the informant's admission that he had conversed with the defendant and because of the defendants' assertion that the conversation was a form of questioning. *See* Massiah v. United States, 377 U.S. 201 (1964); Brewer v. Williams, 430 U.S. 387 (1977).

The district court ruled alternatively that the admission of the informant's testimony was harmless error because the defendant "was clearly identified by eyewitnesses as one of the bank robbers." On this score, the district judge's recollection of the evidence was inaccurate. The defendant was not identified by any witness to the robbery. Indeed, the government's brief acknowledges that its case against

the defendant was founded solely on statements of informants and circumstantial evidence. I therefore join in Judge Winter's conclusion that the error was not harmless.

RUSSELL, Circuit Judge, dissenting:

I respectfully dissent.

The issue in this case is whether the testimony of Nichols, recounting the incriminating information given him by the defendant while the two were prison cellmates, should have been excluded as violative of the defendant's right to counsel under the Sixth Amendment. The majority, relying on *Massiah*[1] for authority, would hold that it should be excluded. I disagree.

As I read *Massiah*, it commands exclusion only when the challenged testimony is the result of "interrogation." And this is indisputably the way the Supreme Court in the recent case of *Brewer* v. *Williams*[2] read *Massiah*. The prevailing opinion of Justice Stewart in *Brewer* declared "that once adversary proceedings have commenced against an individual, he has a right to legal representation *when the government interrogates him*" but, applying the rule to the facts in *Brewer*, it added that "no such constitutional protection [of the right to counsel] would have come into play if there had been no interrogation." (Italics added)[3] Justice Powell in

[1] 377 U.S. 201 (1964).

[2] 430 U.S. 387 (1977).

[3] 430 U.S. at 400-401.



his concurring opinion (which was necessary to the decision of the Court) was even clearer. He saw the critical issue to be whether there had been interrogation in fact; if there were no interrogation, there would be no constitutional violation and no ground for exclusion.[4] The dissenting opinion agreed with the opinion of Justice Stewart that exclusion of the evidence turned on whether it was the result of "interrogation." Actually, the dispute in the various opinions in the case did not concern whether "interrogation" is a prerequisite for exclusion of incriminating statements by a defendant for a violation of the defendant's Sixth Amendment rights: the dispute centered on whether there had been "interrogation." "Interrogation" is thus established by *Brewer* as the key issue. To paraphrase again Justice Stewart's opinion in that case, "if there [has] been no interrogation," the constitutional right to counsel does "not come into play" or arise.

The majority opinion here appears to recognize that *Brewer* has now established beyond question that the issue in this case turns on whether the testimony in dispute was the result of "interrogation." It dismisses the issue, however, with the comment that " 'interrogation' is a relative term." If, by this, the majority means that "interrogation" is not limited to direct questioning, we would agree. In *Brewer*, the officer did not engage in direct questioning of the defendant. Knowing, however, that the defendant

[4] 430 U.S. at 410; Note, 38 *La. L. Rev.* 239, 244 (1977).

was of questionable mental capacity and of strong Christian faith, he made a very clever speech to the defendant about the shame of the small slain girl left out in the freezing cold without a decent "Christian burial" with the plain purpose of shaming him into revealing the whereabouts of the slain girl's body. That speech, the majority found, was "tantamount to interrogation" [5] or, as Justice Powell characterized it, was "a skillful and effective form of interrogation." [6] But presence, alone,[7] is not enough to constitute interrogation. Nor is listening interrogation. The mere "subjective desire to obtain information from a suspect after arraignment," if unaccompanied by some affirmative action, either direct or subtle, reasonably *calculated to induce conversation relative to the crime*, will not satisfy the requisite of "interrogation." [8] The officer or informer must stimulate, however, subtly, the incriminating conversation to satisfy the test of "interrogation."

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[5] 430 U.S. at 400.

[6] 430 U.S. at 412.

[7] The suggestion that in *Massiah* the only action of the informer, inducing the confession by the defendant, was that he was simply present is rebutted by the citation in note 2 of the majority opinion, which quotes the language of the Court of Appeals in *Massiah* (307 F. 2d 62, 66 (2nd Cir. 1962)) indicating "that the co-defendant had solicited information about the pending case." Actually, the informer in *Massiah* deliberately engaged Massiah in conversation for the sole purpose of eliciting incriminating statements in order that the police might monitor them on a hidden radio. 377 U.S. at 202-203.

[8] 430 U.S. at 440 (Blackmun, J., dissenting).



The majority opinion makes little effort to qualify the action of the informer in this case as "interrogation" unless simply the "presence" of a paid informer is sufficient.[9] In any event, the conduct of the informer in this case would not so qualify. The informer Nichols was a state prisoner, serving a state sentence. He had formerly been a paid informer for the federal government but he had fallen afoul the state forgery laws and was at the time a state prisoner. In late November, 1972, an FBI agent visited Nichols at the jail where he was imprisoned. Nichols told the agent there were a number of federal prisoners, including the defendant, in his cell block in the jail. The agent did not know that the defendant and Nichols were cellmates and he had nothing to do either with Nichols being in the same jail with the defendant or with the two being made cellmates. The agent told Nichols to be alert to any statements by the federal prisoners. He expressly instructed Nichols not to initiate any conversation with the federal prisoners, but, if they talked, to pay close attention to what they said. Nichols was merely to listen. In particular, Nichols was directed "not to question [the defendant] in regard to the bank robbery."

Some weeks later, after Nichols had completed his state sentence and had been released, the agent saw Nichols, who told him of the incriminating statements he heard the defendant make. There is no evidence that Nichols had in any way violated the

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[9] *See* note 7, *supra*.

instructions given him by the agent. The record indicates that the defendant's incriminating statements were voluntarily and spontaneously given without any encouragement from Nichols. And the District Judge so found. Under this finding, by which we are bound since it cannot be said to be clearly erroneous, there was no "interrogation" of the defendant by Nichols, however broadly that term may be defined.

The majority—I repeat—offers nothing to suggest that the statement of the defendant, testified to by Nichols, was secured as a result of "interrogation" beyond the ambiguous statement indicating that presence of an undisclosed informer-listener in the cell with the defendant satisfied "interrogation" under its definition of that term as merely "relative." This conclusion follows from the unique way in which the majority opinion proceeds to find "that there was interrogation within the meaning of *Brewer*." It predicated its crucial conclusion that there was interrogation by finding that "*by association, by general conversation*, or both, Henry developed *sufficient confidence in Nichols that Henry bared his incriminating secrets to an undisclosed paid informer*." (Italics added) In effect, what the majority is saying is that a defendant's voluntary incriminating admissions become the product of an interrogation, as that term is defined in *Brewer*, merely because the person who hears the voluntary admission is an "undisclosed paid informer" in whom the defendant "by association" has developed a "confidence" that the person will keep his secret.



The primary element of this definition of "interrogation" is apparently the "undisclosed" or "surreptitious" character of the government informer.[10] But *Brewer* made it quite plain that whether the confession or damaging admission had been "elicited surreptitiously" was "constitutionally irrelevant."[11] And this is the way *Brewer* has been interpreted by all the commentators.[12] Moreover, it was so applied in the recent case of *United States* v. *Hearst* (9th Cir. 1977) 563 F.2d 1331, 1348, *cert. denied* —— U.S. ——, 98 S. Ct. 1156. If, on the other hand, the

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[10] This seems to follow from the earlier statement in the majority opinion, based on an opinion dissenting from denial of certiorari in *Miller* v. *California* (1968) 392 U.S. 616, that "[a]n *undisclosed* government agent may effectively 'interrogate' a defendant by simply engaging the defendant in a general conversation * * *." (Emphasis added)

[11] 430 U.S. at 400.

[12] *See*, Note, *The Right to Counsel: An Alternative to Miranda*, 38 *La. L. Rev.* 239, 244 (1977); Note, *The Right to Counsel and the Strict Waiver Standard*, 57 *Neb. L. Rev.* 543, 550 (1978).

The full quote in the *La. L. Rev.* is as follows:

> "While slight factual differences exist between the cases, [*Massiah* and *Brewer*] the majority resolved the difficulties by stating that whether incriminating disclosures made in the absence of counsel were elicited openly or surreptitiously is constitutionally irrelevant in determining whether the right to counsel had been abridged."

And it was in support of this point that the plurality opinion cited *McLeod* v. *Ohio* (381 U.S. 356) and only to this point. 430 U.S. at 400.

language of the majority opinion in its critical conclusion represents a general condemnation, on constitutional grounds, of the use of "undisclosed" undercover agents and informers, paid or unpaid, and the infiltration of such agents,—if their "*undisclosed*" character is the critical point in the majority opinion's holding of constitutional invalidity—it flies straight into the teeth of repeated decisions of the Supreme Court finding that the use of such undercover agents and informers presents no constitutional violation. The use of informers, whether voluntary or paid, has never been found to be reprehensible, or, to quote a leading case, "as a deprivation of due process of law based on the notion that such practice is 'unfair' or 'offend[s] those canons of decency and fairness which express [our] * * * notions of justice'." [13] Indeed, in a case last year which originated in this Circuit, the Court spoke approvingly of "the value it [undercover policework] often is to effective law enforcement." *Weatherford* v. *Bursey* (1977) 429 U.S. 545, 557. For other recent cases finding no constitutional taint attaching to undercover activities by the police, *see United States* v. *Russell* (1973) 411 U.S. 423, 432 and *United States* v. *White* (1971) 401 U.S. 745, 752. These authorities simply confirm the conclusion that the use of undercover agents, or "secret informers," does "not violate [the defendant's] Fourth, Fifth or Sixth Amendments rights." [14]

[13] *United States* v. *Fioravanti* (3d Cir. 1969) 412 F. 2d 407, 414, n. 15, *cert. denied sub nom Panaccione* v. *United States*, 396 U.S. 837, relying on *Hoffa* v. *United States*, 385 U.S. at 310-311.



If the heart of the crucial rule promulgated by the majority, however, is that the association as a cellmate creates such a feeling of "confidence [in a defendant]" as to induce him to "bare his incriminating secrets" to the undisclosed paid informer-cellmate as to make it a constitutional violation to admit into evidence other "incriminating secrets," it is effectively refuted by the ruling of the court in *Hoffa* v. *United States* (1966) 385 U.S. 293, 302, that the Constitution affords no protection to "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it," even when that person is an "undisclosed informer." In that case, the informer had insinuated himself into the defendant's confidence by representing himself as a long-time friend and associate anxious to aid in the defendant's defense. This principle in *Hoffa* was followed in *Fioravanti*, in which an undercover agent infiltrated the criminal group, was arrested with the group, and while both the defendant and the undercover agent were "confined [together] in the bull pen," the defendant, who "thought that he was conversing with a fellow partner in crime, not a policeman," made incriminating statements.[15] The court had no hesitancy in finding the testimony of the undercover agent about the in-

[14] *United States* v. *Fioravanti, supra,* at 413, n. 15, 412 F. 2d.

[15] 412 F. 2d at pp. 409 and 413.

criminating statements admissible in that case. And the ruling in that case is similar in many respects to our own case of *United States* v. *Dowdy* (4th Cir. 1973) 479 F. 2d 213, 229-230, *cert. denied* 414 U.S. 823, 866, *reh. denied* 414 U.S. 1117. There the person engaged in a bribery scheme with the defendant turned into an FBI informer. As a result of his association in crime with the defendant, he had established a relationship under which the defendant felt he could talk freely with him without fear of repetition. We found no constitutional bar to the admission of the incriminating statements of the defendants. In *United States* v. *White* (1971) 401 U.S. 745, 751, the incriminating statement was made to "a police agent who conceal[ed] his police connections," but no invalidity was found in the admission of the undisclosed "police agent's" statement.

In short, there is no case, so far as I can find, which makes any distinction on grounds of constitutional admissibility between incriminating statements testified to by secret informers and by private individuals. Not even the dissenting opinion in *Miller* v. *California*, which incidentally is the only authority cited by the majority opinion in support of its ruling, makes such a distinction. There is no reason to assume that an incriminating statement is any less reliable or trustworthy, if made to an undisclosed informer or undercover agent than if made to a private individual and there is no basis for treating the two situations differently for purposes of admissibility.



I submit that for the reasons given the basis upon which the majority opinion rests its conclusion is untenable, however it may be viewed, and is contrary to authority. As a matter of fact, there are two recent decisions which clearly cannot be reconciled with either the reasoning behind the majority opinion or the result reached in it. The first of these is *United States* v. *Hearst*, *supra*, (563 F. 2d 1331). In *Hearst*, the conversation of the defendant with a prison visitor, unknown to her, was monitored and recorded "surreptitiously" by the prison authorities. This was done because of the jail's policy of monitoring conversations in "very publicized cases or high security problems." [16] The Court emphasized that there was no evidence the visitor had "engaged [the defendant] in the conversation later used against her." The defendant, however, argued that the "deliberate, secret listening" [17]—that is, the "surreptitiously obtaining"—without the presence of counsel violated the defendant's Sixth Amendment rights as established by *Massiah*. In effect, the situation was analogous factually to this case and the position taken by the defendant in that case was similar to that taken by the defendant here. The Court, however, dismissed the claim, stating at p. 1348:

> "The Supreme Court in *Brewer* v. *Williams*, * * * recently interpreted *Massiah* in a manner directly opposed to appellant's contention. In

[16] 563 F. 2d at 1344.

[17] 563 F. 2d at 1347.

*Brewer*, the Court stated in unambiguous terms that 'no such constitutional protection [of the right to assistance of counsel at the time the defendant made the incriminatory statements] would have come into play if there had been no interrogation.' * * * Relevant to appellant's argument that by secretly listening to incriminating statements the government violated the rights defined in *Massiah*, the Court stated: 'That the incriminating statements were elicited surreptitiously in the *Massiah* case, and otherwise here, is constitutionally irrelevant . . . Rather, the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation *when the government interrogates him.*' * * * (emphasis added; citations omitted). Thus, under *Massiah*, as interpreted by *Brewer*, there was no violation of appellant's Sixth Amendment right to the assistance of counsel because there was no interrogation of her—either formally or surreptitiously—by the government." (citations omitted)

There is no way to distinguish *Hearst* from this case. The challenged statements were procured secretly and surreptitiously in both cases. In neither case had there been "interrogation," as that term was used in *Brewer* and *Massiah*. Neither Nichols in this case nor Tobin in *Hearst* had engaged the defendant in conversation. It has been suggested that there may be a difference between a *paid* informer reporting a face-to-face admission and testimony from a *paid* government employee who surreptitiously, through the use of electronic surveillance, secures the



incriminating information and that such difference distinguishes this case from *Hearst*. *Wilson* v. *Henderson* (2d Cir. 1978) —— F. 2d ——, 24 CrL. 2105-2106 (decided September 20, 1978), slip opinion pp. 4770-4771, however, gave what appears to me to be the conclusive answer to this suggestion:

> "Furthermore, the admission of an in-custody statement voluntarily made to an informant seems less egregious than the use of a statement intercepted by an electronic eavesdropping device as was upheld in *United States* v. *Hearst*, * * *. When a defendant makes a completely unsolicited, incriminating remark in a face-to-face encounter with an informant, he knowingly assumes the risk that his confidant may ultimately prove to be untrustworthy. In an illegal search and seizure case the Supreme Court stated:
>
> > " '[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966).' "

*Wilson* v. *Henderson* is even more directly in point. In that case the defendant's cellmate agreed "to act as an informant." He was "instructed not to inquire or question, but to keep his ears open for information * * *. The circumstances under which the incriminating statement of the defendant was made are thus described in the opinion:

> "Initially, Wilson (the defendant) repeated to Lee (the cellmate-informer) the same version of the facts that he had related to Cullen (the investigatory officer). Lee's only comment was that the story did not sound too good. By the end of the third day, Wilson made an auricular confession to complicity in the robbery and murder." [18]

The defendant claimed that this incriminating statement "was improperly admitted at trial in violation of his Sixth Amendment right to counsel under *Massiah* v. *United States*, * * *." [19] It is evident that factually this case is on all-fours with our case and that the legal issue is precisely the same. In that case, the Court held, contrary to the majority opinion in this case, that "where Lee did not interrogate Wilson, nor in any way attempt to deliberately elicit incriminating remarks, the rule of *Massiah* [had] not been transgressed." [20] With particular reference to the informer's presence as a cellmate, the Court said (Slip opinion p. 4770):

> "Nor is the fact that the informant was placed in Wilson's cell under surreptitious circumstances a distinguishing point in this case. This court has repeatedly held that a defendant's voluntary, incriminating statements made to a person known by the defendant to be a government officer are properly admissible under *Massiah*. *United*

[18] Slip opinion p. 4761.

[19] Slip opinion p. 4766.

[20] Slip opinion p. 4770.



> *States* v. *Garcia*, [377 F.2d 321]; *United States* v. *Gaynor*, 472 F. 2d 899 (2d Cir. 1973); *United States* v. *Barone*, 467 F. 2d 247 (2nd Cir. 1972); *United States* v. *Maxwell*, 383 F. 2d 437 (2nd Cir. 1972) cert. denied 389 U.S. 1043 (1968); *United States* v. *Accardi*, 342 F. 2d 697 (2nd Cir. 1965) cert. denied 382 U.S. 954 (1965). Ostensibly, comparable statements made to undercover agents should receive similar treatment because the fact that an incriminating statement is received surreptitiously or otherwise is constitutionally irrelevant. *Brewer* v. *Williams*, 430 U.S. at 400."

Certainly, there can be no distinction drawn between this case and *Wilson*. In fact, if anything, the facts in that case were more favorable to the defendant's claim than are the facts in this case. Here, the government agent knew only that Nichols was in the same prison unit as the defendant but, unlike the officer in *Wilson*, he did not know that the defendant and Nichols were cellmates. In *Wilson* it seems the informer was actually placed in the cell with the defendant with the knowledge, if not at the instance, of the investigating officer. That is not true in this case.

The Court in *Wilson* declared that the conduct of the government in that case was not "the type of reprehensible police behavior which the courts feel compelled to discourage. The instructions to Lee suggest a conscious effort on Cullen's part to guard Wilson's constitutional rights while pursuing a crucial homicide investigation. His directions, 'Don't ask

questions; just keep your ears open,' suggest familiarity and attempted compliance with, not circumvention of, the principle of *Massiah*. Under these circumstances, exclusion of Wilson's confession to Lee would serve no useful purpose. Accordingly, we are of the opinion that there was no infringement of Wilson's Sixth Amendment right to the assistance of counsel." [21] That is precisely this case and I suggest we should express the same view here as did the Court in *Wilson*.

In sum, I think *Brewer* plainly declares that without interrogation there is no violation of *Massiah*. This is the construction given *Brewer* in all the comments on that case; it is the construction given it by two Circuit Courts of Appeals. The only authority cited by the majority opinion in contradiction is a dissenting opinion filed years before *Brewer*, written by one of the dissenters in *Brewer*. Without the slightest evidence of any interrogation of the defendant by Nichols in connection with this crime, the majority finds interrogation merely by the presence of the informer in the cell with the defendant. Presence, *whether surreptitious or not*, does not constitute interrogation within *Brewer*. I dissent.

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[21] Slip opinion p. 4771.



## APPENDIX B

## JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2338

BILLY GALE HENRY, APPELLANT

*versus*

UNITED STATES OF AMERICA, APPELLEE

[Filed Dec. 26, 1978]

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the-United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed. The case is remanded to the United States District Court for the Eastern District of Virginia, at Norfolk, for further proceedings consistent with the opinion of this Court filed herewith.

/s/ William K. Slate, II
Clerk

3/1/79: Petition for rehearing filed.

3/30/79: Order denying petition for rehearing filed.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 77-2338

BILLY GALE HENRY, APPELLANT

*versus*

UNITED STATES OF AMERICA, APPELLEE

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ORDER

[Filed Mar. 30, 1979]

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The appellee's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll on the suggestion for rehearing en banc was requested but did not carry. Judge Russell, Judge Widener, and Judge Hall dissent from the denial of rehearing en banc.

IT IS FURTHER ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Winter.

For the Court,

/s/ William K. Slate, II
Clerk



APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 75-453-N

BILLY GALE HENRY, PETITIONER

*vs.*

UNITED STATES OF AMERICA, DEFENDANT

MEMORANDUM ORDER

This civil action was remanded to this court by the Fourth Circuit Court of Appeals, with direction that the plaintiff be given an opportunity to file an amended petition to set forth any and all grounds upon which he seeks relief. An amended petition or complaint ws received by the Clerk on June 29, 1977. The United States has responded denying the allegations. The amended complaint raises the following 10 separate issues:

1. Probable cause did not exist for the issuance of an arrest warrant.
2. A denial of the right to counsel because of a questioning conducted by an FBI agent after arrest.
3. Denial of the right to counsel on the allegations that informers were agents of the United States during their interview with plaintiff while he was in confinement.

4. Knowingly using perjured testimony.

5. Competency to stand trial destroyed by jail conditions.

6. Failure to disclose material evidence.

7. Suppression of material evidence through non-disclosure.

8. Denial of a competency hearing.

9. Illegal search of the residence at Wailes Avenue.

10. Imposition of an illegal sentence.

In addition to the above amended complaint, while this Civil Action #75-453-N was on appeal to the Fourth Circuit Court of Appeals, the defendant filed a motion for a new trial in Criminal Action No. 72-243-N, the conviction which he attacks by his habeas proceedings. Action on that motion was stayed pending decision by the Court of Appeals of the civil action.

In the motion for a new trial Henry asserts he has discovered new evidence. He attaches an affidavit of one John Paul Smith. In the affidavit Smith asserts that he was a participant in the bank robbery of the United Virginia Bank at Janaf Shopping Center, Norfolk, on August 28, 1972, the robbery for which Henry was convicted and which he now attacks. Smith asserts in the affidavit that he entered the bank shortly after 9:00 a.m. on August 28, 1972, with one other person while a third person waited in the car in front of the bank; that he vaulted the counter of the head teller's cage and after a struggle removed two duffel bags of night deposits; that only two other persons were involved and that Henry was not one of them; that Henry had no



knowledge of the robbery and in no way participated therein; and that Henry was a business associate of his and never had knowledge of any crimes.

The motion for a new trial filed in the criminal action and the habeas corpus proceedings are consolidated and are dealt with in this order.

I.

We commence with the principle that this habeas corpus proceeding is a civil one, and that the burden is upon the plaintiff of showing a substantial constitutional deprivation. *Johnson* v. *Zerbst*, 304 U.S. 458, 469 (1938); *Clayton* v. *Haynes*, 517 F.2d 577 (4 Cir. 1975). In the *Johnson* case the Supreme Court pointed out that it must be remembered a judgment could not be lightly set aside by collateral attack even on habeas corpus; that when collaterally attacked the judgment of the Court carries a presumption of regularity.

II.

*United States* v. *Williams*, 415 F.2d 232 (4 Cir. 1969) sets forth the requirements of a motion for a new trial based on the grounds of newly discovered evidence as follows:

(a) It must appear from the motion that the evidence relied on is, in fact, newly discovered, that is, discovered after the trial.

(b) The motion must allege facts from which the Court may infer diligence on the part of the movant.

(c) The evidence relied on must not be merely cumulative or impeaching.

(d) It must be material to the issues involved; and

(e) Must be such as, on a new trial, would probably produce an acquittal.

The evidence at the robbery trial overwhelmingly establishes Henry as a participant.[a] Henry's associates in the instant bank robbery were Moore and Luck. Moore and Luck were tried prior to the time of Henry's trial and conviction. They were clearly and fully identified as the other two parties who participated in the robbery, were convicted, their convictions affirmed on appeal, and they are now serving their sentences. Moore and Luck were found in possession of the funds removed from the bank, the equipment and facilities used in the robbery and clearly identified as associated with Henry. The affidavit of Smith is not worthy of belief. The Court is not required to and does not believe Smith, and there is no truth in the statements in the affidavit.

Under all the facts and circumstances in the case, if Smith were to appear and testify in accord with the affidavit and it would be highly unlikely he would do so—it would not change the outcome of the case. In passing, the Court merely notes that Smith in his affidavit states that Henry was a business associate of his "and never had knowledge of any crimes." The statement that Henry never had knowledge of any crimes is so preposterous that no one would accept it as true, for Henry, in a signed letter

[a] See detailed facts hereafter set out.



addressed to the United States Attorney for the Eastern District of Virginia, received July 19, 1977 from Leavenworth, Kansas, concerning these cases sets forth "I've spent most of my adult life in prison —it is no longer punishment, it i 'a way of life'." Smith does not seem to know the individual to whom he spoke.

This motion is DENIED.

III.

Turning to the habeas complaint, the issues will be dealt with in the order in which they were set forth in the complaint.

1. Henry complains that he was illegally arrested because probable cause did not exist for the issuance of a warrant of arrest. A warrant for his arrest was sworn out in Norfolk, Virginia, on September 22, 1972, before the United States Magistrate charging him with bank robbery by force. The complaint was based on information furnished by FBI Agent O'Hara. It sets forth that Henry was identified as the individual who rented a residence at 6420 Wailes Avenue, Norfolk, under the name of Allen R. Norris. On August 23, 1972,[1] a rental receipt for said premises in the name of Allen R. Norris was recovered from an abandoned 1967 Ford automobile following the robbery. It was identified as the getaway car

[1] This is the house where Luck and Moore were found, with all of the funds from the bank robbery, on the morning following the robbery.

in the robbery. Henry had been positively identified as using the name of Allen R. Norris and Robert A. Norris, and had been identified as being with Luck and Moore. Henry contends such information does not establish probable cause. In his complaint Henry contends that Agent O'Hara made oath he had seen Henry in the company of Moore and Luck. The record is absolutely to the contrary. O'Hara's affidavit set forth that Henry had been identified as being with Luck and Moore.

The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. The standard is "probable cause to believe the suspect has committed a crime" to be determined by a Magistrate in a nonadversary proceeding on hearsay and written testimony. It does not require appointed counsel. *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). The test is whether the information and knowledge of the facts are trustworthy and sufficient to warrant a prudent man in believing that the person had committed an offense. In *Draper* v. *United States*, 358 U.S. 307, 313, the Court said:

> "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal techncians, act." Brinegar v. United States, supra, at 175. Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162.



But even where a defendant is arrested without probable cause, "a conviction will not be vacated on the grounds that the defendant was detained pending trial without a determination of probable cause." *Gerstein* v. *Pugh, supra,* at page 119. Illegal arrests or detention do not void a subsequent conviction, *Gerstein* v. *Pugh, supra*; *Frisbie* v. *Collins*, 342 U.S. 519 (1952); *Ker* v. *Illinois*, 119 U.S. 436 (1886).

2. Defendant Henry was arrested in Atlanta, Georgia, and transferred to the custody of the Marshal in the Eastern District of Virginia. While he was in the Marshal's office being processed, FBI Agent O'Hara entered the office, saw Henry and then identified himself. He asked Henry if he could talk to him. Henry replied in the affirmative. Later, agent O'Hara and another agent went to the jail cell in the Norfolk City Jail where Henry was confined, and after further identifying himself and giving Henry the *Miranda* warnings, proceeded to interview him. At the time of trial, out of the presence of the jury, the Court heard the evidence concerning the voluntariness of any statement allegedly made by Henry. Henry was permitted to and did testify before the Court concerning the voluntariness of the interview. He clearly admitted that he was given the full *Miranda* warnings, was not threatened or mistreated in any way, and that he voluntarily con-

ferred with the agent. The Court made a finding in the record that the statements made by Henry were freely and voluntarily made. He denied any connection with the bank robbery. The statement was thereafter presented for consideration by the jury. Henry was advised fully of his right to testify at his trial and further advised that he could testify on the issue of the voluntariness of his statement, and that if his direct testimony was limited to the issue of the voluntariness of the statement, any cross-examination would likewise be limited to that issue. He did not choose to testify either on that issue or in his own defense.

Not only was the statement voluntarily given, but if there is any error in its admission or as to its voluntariness, the error was a matter to be challenged in a direct appeal.[2] Having once been given a full opportunity to raise the question, he is not entitled to collaterally attack it. The Supreme Court made this perfectly clear in *Wainwright* v. *Sykes*, —— U.S. —— (June 1977), and it was clearly decided by the Fourth Circuit in *Allen* v. *United States*, —— F.2d

[2] "Errors in the admissibility of evidence are "not cognizable upon collateral attack . . ." *Neeley* v. *United States*, —— F. 2d —— (4 Cir. No. 75-2368) 12/23/76. In *Neeley* the same issue was raised of suppression of evidence of a lineup. The Court pointed out that Neeley, having participated in the lineup, was well aware it had been conducted "and it became his attorney's duty to elicit on cross-examination the facts which would be favorable to his client's case." Henry admits he participated in the interview and did so voluntarily. Having participated, he was well aware the interview had occurred.



——, No. 75-2010, decided February 3, 1977, where the Court said that "It is well settled that the statutory remedy provided by § 2255 cannot be used as a substitute for a motion for a new trial nor for an appeal." Citing *Houser* v. *United States*, 508 F.2d 509 (8 Cir. 1974); *Taylor* v. *United States*, 229 F.2d 826 (8 Cir. 1956). Further, the issue deals with the admissibility of evidence which the Court said in the Allen case "are not cognizable upon collateral attack and lack merit for consideration otherwise."

Henry was brought to the Marshal's office in Norfolk on November 21, 1972. He did not then have counsel. He had not been arraigned. Counsel was appointed for him on November 27, 1972.

But even if it could be said by any stretch of the imagination that this evidence was improper, it would clearly fall within the rule of harmless error.

3. Henry asserts that when he arrived in Norfolk in custody of the United States Marshal, he saw Agent O'Hara, of the FBI, in the Marshal's office; that he (Henry) discussed with the Marshal the possibility of being housed with Luck and Moore, his associates in the bank robbery; that O'Hara stated he would be put in another jail; that he was housed with Agent/Informer Nichols, at the request of the FBI, and that Nichols questioned him concerning the bank robbery with which he was charged; and that Nichols was released from the Norfolk City Jail with the help of the FBI and other federal authorities.

FBI Agents O'Hara and Coughlin have filed affidavits in this action. O'Hara was in charge of the

investigation of the bank robbery with which Henry was charged, and was assisted by Agent Coughlin.

Henry was first jailed in Norfolk on November 20, 1972, and was interviewed by Agent O'Hara on November 21, 1972, after being fully advised of his rights. On November 21, 1972, Coughlin contacted Nichols at the Norfolk City Jail. Nichols had previously, over a period of about four years, provided information to the FBI, and had been paid for his services in doing so. Nichols had been in jail since about June, 1972 on state charges of forgery. He told Coughlin he was in the same cell block as Henry, as well as other federal prisoners awaiting trial. He was told by Coughlin to be alert to any statements made by them, and if they engaged him in conversation or talked in front of him, to pay attention to their statements. He was told not to initiate any conversation with Henry, but if Henry conversed, to pay close attention to him. Coughlin again contacted Nichols on December 6, 1972. Nichols had then been released from the Norfolk City Jail. Nichols related that Henry had engaged him in conversation, and requested his assistance. Henry told him about the bank robbery charges; that he (Henry) knew Nichols was getting out soon, and he wanted Nichols to contact a woman in Virginia Beach, known as "Hink"; that Henry had prepared information on where she lives, and he wanted her to come to the jail to see him and act as a go-between between Henry and his partners, who were then supposed to be in the Portsmouth City Jail. He told Nichols about how the bank



robbery occurred. Henry also asked Nichols to make a call to one "Junior" or "Nail", and gave Nichols the telephone number. Henry requested Nichols to obtain a hand-cuff key and floor plan of the Norfolk City Jail and the U.S. Marshal's Office. Further, he asked Nichols to keep in contact with him after his release from jail. Nichols made contact with the female named "Hink" on December 7, 1972. He was paid by the FBI for furnishing this information.

Coughlin states he never requested anyone affiliated with the Norfolk City Jail to place Nichols in a cell with Henry, never sought to have Nichols placed in the same cell with Henry, nor had he contacted anyone in the Norfolk City Jail, Portsmouth City Jail or United States Marshal's Office to have Henry lodged in a specific jail. He says he never interceded with anyone on behalf of Nichols to have him released from jail, and his belief was Nichols was being released because he was due to be released.

He states he specifically told Nichols not to question Henry in regard to the bank robbery.

Agent O'Hara filed an affidavit in which he states he was aware Coughlin obtained information from Nichols; that Nichols was not directed at anytime to solicit information from Henry, either by Coughlin or himself. He said he did not contact any Norfolk or Portsmouth jail authorities or the United States Marshal's Office to arrange for any particular cell mate for Henry.

At time of Henry's trial, Nichols testified that he had told FBI Agent Coughlin of the statements made by Henry; that he was not requested by Coughlin to ask questions of Henry, and that Coughlin did not tell him "anything about the bank robbery at the Janaf Branch of the United Virginia Bank on August 28, 1972." (Tr. page 135) Since the information which Nichols testified to was in general correct, he must have received it from Henry. Nichols said that Henry told him "that the only thing to connect him to the bank was a rent receipt of a house he had rented.[3] Nichols was cross-examined. He related he had furnished the information to Coughlin, that he had been convicted of a felony; and that he had been released from jail.[4] It is apparent that counsel did not pursue examination of Nichols on how or why he was released from jail, for the jury had heard he furnished information about what Henry had said in November-December, 1972, and was out of jail in March, 1973. Counsel for defendant could and probably did, argue Nichols was rewarded for his testimony by his release from jail.

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[3] This information was correct. The rent receipt was found in the escape car, which had been abandoned about a mile from the bank. It gave the address of the house Henry was identified as having rented under the name of Norris. It led the officers to the house where Luck and Moore were arrested with the money and checks taken from the bank, and the guns, clothing, masks and other equipment used in the robbery. Henry, the third party in the robbery, dropped Luck or Moore off at the house and went back to Atlanta.

[4] The trial at which Nichols testified was on March 7, 1973.



While Henry says the facts bring this case within the holding of *Massiah* v. *United States*,[5] 377 U.S. 201 (1964), it is clear the facts are entirely different. Here, the evidence clearly shows Nichols was not employed to question Henry or to seek information from him, but to merely report what he heard. There is no requirement an accused be furnished counsel when he wishes to shoot off his mouth. Here, the Court accepts the statements of the FBI agents that they did not request Nichols to question Henry or engage him in conversation, but only to listen to any statements Henry might make within their hearing and report it to them. Nichols confirms this. Further, the allegation that the FBI had any part in where Henry was housed, or in having him placed in any particular jail or cell, and the placing of Nichols in the cell with him is clearly untrue.

Too, even assuming evidence should not have been admitted, there was no objection, and the objection therefore now comes too late. Error in the admission of evidence is not a proper issue to be raised in a § 2255 action. *Allen* v. *United States*, *supra*;

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[5] In *Massiah*, the Court held that evidence of a defendant's own incriminating words "which federal agents had deliberately elicited from him after he had been indicted and in the absence of counsel," could not be used against him. (377 U.S. 206) Further, *Massiah* dealt with the admissibility of evidence, objected to, on direct appeal and not a collateral attack on its admission. At trial, the witness was not asked whether he had been requested to seek information from Henry, whether he was asked to seek out Henry for information, etc.

*Neeley* v. *United States*, 405 F.Supp. 1186 (D.C. W.Va. 1975), *aff'd.* 532 F.2d 751 (4 Cir. 1976); *Houser* v. *United States*, 508 F.2d 509 (8 Cir. 1974); *Chishom* v. *United States*, 510 F.2d 356 (8 Cir. 1975) and cases there cited; *Cauley* v. *United States*, 294 F.2d 318 (9 Cir. 1961).

In considering all of the facts of the case and the assertions made by the complaint, even if it be conceded there was error in the admission of the testimony of Sadler and Nichols, the error was harmless. Without contradiction of any fact or circumstance, Henry was clearly identified by eyewitnesses as one of the bank robbers; he was identified as the individual who rented the Wailes Avenue house and who paid the rent thereon and received the receipt therefor. His fingerprints were found on the receipt and lease. He was identified as being at the house before the robbery and as the one who purchased the getaway car. He was clearly observed in the area, and in the presence of Luck and Moore, the other two bank robbers. While the burden is on the United States to establish the guilt of a defendant beyond a reasonable doubt, once this is done, where none of the facts are refuted by any testimony or circumstances, the admission of evidence without which the guilt is clearly established should not permit such guilty person to escape or be granted a new trial. As the Court said in *Harrington* v. *State of California*, 395 U.S. 250, 254 (1969), in dealing with the admission of evidence alleged to be error, "apart from them (meaning the alleged improper items of evidence)



the case against Harrington was so overwhelming that we conclude that the violation of *Bruton* was harmless beyond a reasonable doubt, unless we adopt the minority view in *Chapman* (386 U.S. 42-45) that a departure from constitutional procedures should result in an automatic reversal, no matter the weight of the evidence." See also *Wilcox* v. *United States*, —— F.2d —— (4 Cir. 9/14/77).

4. Henry asserts the government made use of perjured testimony when it called Joseph Sadler as a witness against him. In order to vacate a conviction on the allegations of the use of perjured testimony, the party seeking relief carries the burden to establish it was false, material, and knowingly and intentionally used by the prosecution. *McBride* v. *United States*, 446 F.2d 229, 232 (10 Cir. 1971), *cert. denied*, 405 U.S. 977 (1971); *Thompson* v. *Garrison*, 516 F.2d 986 (4 Cir. 1975); *Allen* v. *United States*, —— F.2d —— (4 Cir. No. 75-2010, 2/3/77); *Green* v. *United States*, 313 F.2d 6 (1 Cir. 1971); *Elliott* v. *Berto*, 474 F.2d 856 (5 Cir. 1973), *cert. denied*, 411 U.S. 985; *Anderson* v. *United States*, 403 F.2d 451 (6 Cir. 1968), *cert. denied*, 394 U.S. 903; *Holt* v. *United States*, 303 F.2d 791 (8 Cir. 1962), *cert. denied*, 372 U.S. 970; *Hallman* v. *United States*, 490 F.2d 1088 (8 Cir. 1973); *Marcella* v. *United States*, 344 F.2d 876 (9 Cir. 1965), *cert. denied*, 382 U.S. 1016; *Oyler* v. *Taylor*, 338 F.2d 260 (10 Cir. 1964), *cert. denied*, 382 U.S. 847; *Thornton* v. *United States*, 368 F.2d 822 (D.C. Cir. 1966); *Hysler* v. *Florida*, 315 U.S. 411 (1942); see also

*Pyle* v. *Kansas*, 317 U.S. 213 (1942); *Hammond* v. *United States*, 309 F.2d 935 (4 Cir. 1962); *Harrison* v. *Bowles*, 307 F.2d 928, 933 (4 Cir. 1962).

Henry relies upon an affidavit of one Joseph Ray Conway, dated April 13, 1973. In it Conway says he was in the same cell with Henry and Sadler at the Norfolk City Jail; that Sadler told him that he could not stand going back to prison, and that to avoid it he would tell the FBI that Henry robbed the United Virginia Bank at Janaf Shopping Center; that he knew Henry had not admitted robbing the bank but he would tell the FBI anyway, and that they would keep him from going to prison; and that he would do anything to get back on the street.

The Conway affidavit does not reveal when the alleged discussion between Conway and Sadler was supposed to have occurred, or when Conway passed the information to Henry. Sadler was in the cell in the Norfolk Jail with Henry from November 24 through about the middle of December, after which Henry was transferred to the Portsmouth City Jail.

Henry's trial was scheduled for and held March 7, 1973. Sadler contacted Agent O'Hara and O'Hara interviewed him February 28, 1973 at the Norfolk City Jail. At that time Sadler advised O'Hara what he had heard Henry say about the bank robbery. At the trial Sadler testified he had not talked to Agent O'Hara before Henry told him of his activities in connection with the bank robbery; that he had not been requested to question Henry and that O'Hara had not arranged for him to be placed in a cell with



Henry. Further, he said he had not been promised any help in exchange for his testimony, and that at time of trial, he was still in custody.

Sadler testified he expected to be released from jail on probation, and that Henry had asked him to contact a man named Garland Holloway, a friend of Henry's.

O'Hara stated he had never asked Sadler to obtain any information from Henry, and that Sadler furnished the information voluntarily. The statement of Conway is not believable.

Plaintiff's allegation that perjured testimony was knowingly used is without any credible evidence to support.

First, there is no sufficient showing that Sadler testified falsely. Secondly, there is no evidence the United States Attorney, the FBI or others in authority knew or had any reason to believe the testimony was untrue, and hence it could not have knowingly and intentionally used false or perjured testimony. Again, even if it error, it was harmless error. In *Wilcox* v. *United States*, *supra*, the same charge was made and held harmless. That too was a bank robbery, and the defendant claimed in his habeas action the use of false testimony regarding the extent of a bargaining for testimony. In disposing of the matter, the Court said "A review of the record clearly indicates that assuming Wilcox's allegation was true, any error was harmless beyond a reasonable doubt," [page 3, slip opinion] as the bank teller "positively identified Wilcox as one of the rob-

bers." In the case at bar, Henry was positively identified as one of the robbers, as the purchaser of the getaway car, as the one who rented the "hideaway" house, not only by sight, but by his fingerprints.

5. Grounds No. 5 and 8 are combined and discussed together. Henry complains that his competency to stand trial was destroyed by the conditions of the jail where he was confined, and that the Court should have ordered a competency hearing for him. He asserts he was denied proper medication by the jail physician. After inquiry by the United States Marshal the jail physician advised the Marshal in writing of the request from Henry for treatment and of the treatment given. A hearing was held on Henry's complaint that he was being denied proper medication. His sole assertion was that he needed the use of nerve pills. The jail physician testified that when he first saw Henry he was suffering from high blood pressure and that under his medication Henry's blood pressure was reduced to normal. He said there was no need for any type of nerve pills, but only that Henry continue with the medication given. The record of the hearing on that motion clearly establishes that Henry made no application for any type of psychiatric examination. At page 23 of the transcript of that hearing held February 7, 1973, with Henry present, his counsel stated concerning the request for treatment "it is not a request for a psychiatric examination . . . . it does not have anything to do with the man's capacity to



stand trial or be helpful to counsel." At no time was there a request for a psychiatric examination of the defendant, nor did he at any time suggest he was in need of treatment or examination for his mental condition, nor was there any suggestion he was not fully competent to stand trial and cooperate with his counsel. No evidence was presented on behalf of the defendant at trial, nor at any other time, to suggest that he was not mentally competent to stand trial. In view of the statement of Henry's counsel on February 7 in the presence of Henry, if the Court ordered a mental examination it would seem it would be in disregard of the decision of the Fourth Circuit in *United States* v. *Terry*, 506 F.2d 1399 (4 Cir. 1974). *See also Hawks* v. *Peyton*, 370 F.2d 123, 125 (4 Cir. 1966).

6. Grounds 6 and 7 are combined and dealt with together. Here, the complaint is the United States failed to furnish him with *Jencks* Act material when it did not furnish him with information obtained by Agent O'Hara at an interview with Henry and, further that there was a suppressing of material evidence through nondisclosure. Such questions are not cognizable in a § 2255 proceedings. *Allen* v. *United States, supra; Harrison* v. *Baker, supra.*

By no stretch of the imagination could the alleged statement made by Henry to O'Hara be considered *Jencks* Act material. It was not reduced to writing nor recorded by any recording device, nor did it in any respect come within the provisions of the *Jencks* Act. Henry could not have been taken by surprise

for he clearly remembered the occasion and the interview. Notes made by a witness of his activities are not *Jencks* Act statements. *United States* v. *Atkinson*, 513 F.2d 38 (4 Cir. 3/11/75); *United States* v. *Palermo*, 360 U.S. 343 (1959); *Goldberg* v. *United States*, 425 U.S. 94 (1976). In dealing with the issue of furnishing information not requested, the Supreme Court pointed out in *United States* v. *Agurs*, 427 U.S. 97 (1976), that it had not held the government must produce for the defendant exculpatory information not requested and that it is not sufficient for an objection for failure so to do to establish the possibility it might have aided the defendant. In determining the materiality, the Court said that only if the omitted evidence created a reasonable doubt of guilt that did not otherwise exist, was error committed.

7. As grounds No. 9, Henry asserts that there was an illegal search of the residence on Wailes Avenue in which Luck and Moore were found and which was shown to have been leased by him. He also asserts there was an illegal search of the Ford Ventura automobile used by the robbers in making their getaway, and in which the receipt for the rent of the Wailes Avenue house was found. The same evidence presented to suppress evidence obtained in these searches was presented in the Moore and Luck criminal trials. It was there ruled on by Judge Hoffman of this Court, and his ruling affirmed on appeal. The reasoning and facts set forth in that ruling were adopted in this case.



Henry sought to deny he had possession or control over either the Ford automobile or the residence. Without some right to possession or control over either of them it would seem he lacks a standing to challenge the alleged illegal search of either.[4] Here, not only is this a sufficient reason not to suppress the use of the evidence, but the facts clearly justify the search.

The Ford Ventura was the escape car. It was abandoned about 1/2 mile from the scene of the robbery and the robbers transferred to another car. It was found abandoned in a public street. Pursuit, and search of that car led the police to the Wailes Avenue residence. Moore was observed in the residence, as were guns. He exited the residence and was placed under arrest. Luck was also seen through the window of the residence and ordered to come out. It was reasoned the third robber was still in the house. The police entered in pursuit of that party. In open view as they entered the house were the proceeds of the robbery, cash and checks, numerous guns, the signal devices used by the robbers and other paraphernalia.

The Court heard and ruled on the motion to suppress the evidence. The motion was denied. It was

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[4] Suppression of the products of a Fourth Amendment violation can be successfully urged only by one whose rights were violated by the search itself, not one injured solely by the introduction of the evidence obtained. He must establish he was the victim of an invasion of his privacy. Henry contended he had no connection with the house or car. See Jones v. United States, 362 U.S. 257 (1960); Alderman v. United States, 394 U.S. 165, 131-2-3 (1969).

raised on appeal and the ruling of the trial court affirmed. Having been given a full opportunity to raise these issues at trial, and they having been raised and ruled on, and having had the opportunity to raise them on appeal, it comes too late to collaterally attack them. *See Allen* v. *United States*, *supra*. In *Neeley* v. *United States*, —— F.2d ——, No. 75-2368 (4 Cir. decided 12/23/76), the Court said that "Error in the admission of testimony at trial (is an) improper ground upon which to base a claim for post-conviction relief in a proceeding under § 2255." See cases there cited.

As to the search of the automobile, in *South Dakota* v. *Opperman*, —— U.S. —— (7/6/76), the Court pointed out that it had traditionally drawn a distinction between the search of automobiles and homes in relation to the Fourth Amendment because of the inherent mobility of the automobile creating circumstances preventing the rigorous enforcement of the requirement of obtaining a warrant, and secondly, the expectation of privacy is diminished by the obvious public nature of automobile travel. Further, when automobiles are impounded by local police, as was the case here, a search is necessary for the protection of the owner's property while in the custody of the police, protection of the police against claims and disputes, and protection of the police from potential danger. The automobile in this case was seized in a public street and as such "did not involve any invasion of privacy." *G. M. Leasing Corporation* v. *United States*, 429 U.S. 338 (1977).



The law enforcement officers were in pursuit of the bank robbers and such pursuit led them to the Wailes Avenue residence. They were seen through the window. By entering the premises in search of the third person, such entry was in hot pursuit and did not constitute a violation of privacy. In fact, the two robbers, Moore and Luck, came out of the house. In entering the house the items seized were in plain view. As the Court said in *United States* v. *Santana*, 427 U.S. 38, 42 (1976), "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." Further, in the *Santana* case, *supra*, the Court said that in *Warden* v. *Hayden*, 387 U.S. 294 (1967), "we recognized the right of police, who had probable cause to believe that an armed robber had entered a house a few minutes before, to make a warrantless entry to arrest the robber and to search for weapons."

8. Lastly, Henry contends that the sentence imposed was illegal. He says that on March 12, 1975, he was designated as a "special offender," that when he inquired as to the reason, he was informed it was because of information received from the Court and court officials.

The sentence imposed by the Court was a straight sentence. Nothing in the sentencing order or in the sentencing proceedings refers to any "special offender." If the prison authorities are imposing unusual restrictions on Henry, that issue is not now before the Court.

Henry is not entitled to the relief prayed for. His complaint is DENIED and DISMISSED.

IV.

Henry propounded several sets of interrogatories to be answered by Agent O'Hara, Clarence Kelley, the Director of the FBI, a supervisor of the FBI, Agent Coughlin and others. He filed request for production of documents by the Assistant United States Attorney, for production of the trial transcript in the case of *United States* v. *Luck* and *Moore*, and all tangible evidence of the alleged crime, as well as request for admissions of fact by the United States Marshal, Sheriff John Doe of the Norfolk City Jail, the Assistant United States Attorney, Sheriff Owens of Portsmouth and Agent O'Hara. The United States moved to quash asserting that these persons were not parties to this suit and not subject to such procedures. Even if it be conceded that they were required to respond, the answers, admissions and items sought were not proper for consideration in this case, and they are DENIED.

V.

On August 9, 1977, Henry filed a motion for the undersigned to recuse himself from this case on the grounds that the Court had made prejudicial decisions in the past in dismissing the civil rights suits filed by him, denying information sought by him, denying his motion to vacate sentence and denying



the motion to suppress and in the admission of evidence at trial.

Since there were numerous suits filed by Henry, as well as numerous motions in the criminal proceedings and the habeas proceedings, one would be delighted to escape the necessity of reviewing all of these papers and pleadings, but there has been no showing of any proper reason for this Court to recuse itself and place the burden of dealing with this case upon some other judge. The motion is DENIED.

VI.

Henry may appeal in forma pauperis by filing notice of such intention with the Clerk of this court, at Norfolk, Virginia, within 60 days from this date and following the procedures prescribed by law.

/s/ [Illegible]
United States District Judge

Norfolk, Virginia
October 11, 1977

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

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Civil Action No. 75-453-N

BILLY GALE HENRY, PLAINTIFF(S)

*vs.*

UNITED STATES OF AMERICA, DEFENDANT(S)

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JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision having been duly rendered,

It is ADJUDGED and ORDERED that this action be dismissed.

W. FARLEY POWERS, JR.
Clerk

/s/ Beth T. Wingrove
Deputy Clerk

Date: October 11, 1977



## APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 75-2142

BILLY GALE HENRY, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk
Richard B. Kellam, District Judge

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Submitted: March 14, 1977 Decided: March 29, 1977

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Before WINTER, CRAVEN and BUTZNER,
Circuit Judges

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(Billy Gale Henry, Appellant *Pro Se.* Hunter W. Sims, Assistant United States Attorney, for the Appellee.)

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PER CURIAM:

Billy Gale Henry initiated a petition in the district court alleging several grounds in support of a motion to vacate the sentence that he received upon a jury's verdict that he had committed armed bank robbery. The district court denied the motion without requiring a response from the government or conducting an evidentiary hearing. Henry has appealed.

Two of Henry's claims do not warrant relief. He alleged that several of the prosecutor's statements during the course of argument were so prejudicial as to deprive him of a fair trial; review of the trial transcript, however, indicates that when read in context the prosecutor's statements were not so prejudicial as to warrant vacating the sentence. *Compare United States* v. *Gambert*, 410 F.2d 383 (4th Cir. 1969); *with United States* v. *Sawyer*, 347 F.2d 372 (4th Cir. 1965). Henry also characterized some of the testimony against him as hearsay, implying that it should not have been admitted; since the testimony concerned his own statements to the witnesses testifying, however, it was not inadmissible hearsay.

Another of Henry's claims is not so readily dismissed. He alleged that one of the witnesses against him had not disclosed to Henry that he was acting as a government agent during conversations between them in jail after Henry's arrest. Because Henry's attorney was not present during those conversations and Henry had not knowingly and intelligently



waived his right to have his attorney present, questioning under such circumstances would be violative of his rights under the Sixth Amendment. *Massiah* v. *United States*, 377 U.S. 201 (1964). The witness denied at trial that he asked Henry specific questions at the direction of a certain government investigator (Tr. at 135), but that testimony does not refute Henry's claim that the witness worked as a paid informant for the government on a continuing basis and that he was paid for obtaining evidence against Henry. It is therefore necessary to conduct an evidentiary inquiry to determine whether the witness was acting as a government agent during his interviews with Henry, since the records do not "conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255.

Henry's petition to the district court also stated another claim that warranted further inquiry. He alleged that another witness against him at trial had told a cellmate that he would give whatever false information he could against Henry in order to get himself out of jail. Henry also alleged that the government arranged to have that cellmate removed from the jail where Henry was confined prior to trial in order to prevent Henry from discovering that perjured testimony might be used against him. Proof of such allegations would establish that Henry's conviction was unconstitutional under both *Brady* v. *Maryland*, 373 U.S. 83 (1963) (government suppression of exculpatory evidence), and *Miller* v. *Pate*, 386 U.S. 1 (1967) (knowing use of perjured testimony). Therefore, they require an evidentiary in-

quiry since the record does not show them to be meritless.*

In his petition to the district court, Henry also asserted several other grounds for vacating his sentence. Those claims, which were generally stated in a conclusory manner, concerned Henry's competence to stand trial, the effectiveness of his trial counsel, and the government's compliance with a pretrial discovery agreement. In connection with the present appeal, Henry has filed numerous supplemental statements which supply more detail for his claims. Because those detailed allegations were not made to the district court, they are not properly before this Court on appeal. Nevertheless, in order to avoid later repetitious review of fresh petitions from the same prisoner, *see Sanders* v. *United States*, 373 U.S. 1 (1963), it would be appropriate for the district court to permit Henry to develop those additional claims at the same time that it examines the issues for which an evidentiary hearing is otherwise necessary.

Accordingly, the judgment of the district court is affirmed in part and reversed in part. The case is remanded for further proceedings in accordance with the views expressed herein.

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* The district court dismissed those claims in part because Henry's inartful *pro se* petition implied that they had been presented to this Court during the direct appeal of his conviction. *United States* v. *Henry*, No. 73-1413 (4th Cir., Sept. 14, 1973). Review of the materials filed in connection with that appeal discloses no mention of the claim, however.



**APPENDIX G**

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 75-453-N

(Cr. #243-72-N)

BILLY GALE HENRY, PLAINTIFF

*vs.*

UNITED STATES OF AMERICA, DEFENDANT

STATE OF VIRGINIA

CITY OF NORFOLK, VIRGINIA

I. Gerald T. Coughlin, being first duly sworn, depose and say as follows:

1. I am a Special Agent of the Federal Bureau of Investigation (FBI) assigned to the Norfolk, Virginia, Division of the FBI. I participated in the investigation of the bank robbery of the United Virginia Bank/Seaboard National, Janaf Branch, which had occurred in Norfolk, Virginia, on August 28, 1972.

2. On November 21, 1972, I contacted Edward Benjamin Nichols at the Norfolk City Jail. Nichols had been contacted by me for approximately a year prior to this and during my contacts with him, he had provided confidential information to the FBI. Nichols had been paid by the FBI for expenses and services in connection with information he had provided on these previous occasions.

On November 21, 1972, Nichols was contacted at the Norfolk City Jail by me. I believe that he had been incarcerated there since approximately June, 1972, on forgery charges brought by the City of Norfolk, Virginia. At this time, Nichols advised that he was in the same cellblock as Billy Gale Henry as well as with other prisoners who had Federal charges against them. I recall telling Nichols at this time to be alert to any statements made by these individuals regarding the charges against them. I specifically recall telling Nichols that he was not to question Henry or these individuals about the charges against them, however, if they engaged him in conversation or talked in front of him, he was requested to pay attention to their statements. I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but that if Henry initiated the conversations with Nichols, I requested Nichols to pay attention to the information furnished by Henry.

On December 6, 1972, I again contacted Nichols. I believe Nichols at this time had been released from the Norfolk City Jail. Nichols related the following information: Nichols told me that Billy Gale Henry had engaged him in conversation while he was in jail with Henry. Henry had requested Nichols' assistance. Also, Henry had talked to Nichols about the bank robbery charges against him. Nichols stated that Henry knew that Nichols was getting out of jail shortly and that Henry wanted Nichols to go to the City of Virginia Beach for him and to contact a



woman called "Hink". Henry had prepared instructions for Nichols on where this woman lived and wanted Nichols to tell this woman to come see him in the jail. Henry told Nichols he wanted to use this woman as a go-between with his partner, who was in the Portsmouth City Jail. Also, Henry related to Nichols that he and his partner had been looking at the Janaf bank for some time and went on to describe how the bank robbery occurred. Henry also requested Nichols to make telephonic contact for him with an individual by the name of "Junior" or "Nail." Henry provided Nichols with a telephone number. Henry also requested Nichols to obtain a handcuff key and floor plans for the Norfolk City Jail and the U. S. Marshal's Office, inasmuch as Henry wanted to break out of jail. I also recall Nichols advising me that Henry had requested Nichols to maintain contact with him, after Nichols was released from jail. Nichols advised he would comply with Henry's request and report the information to the FBI.

Nichols went ahead with Henry's request and made contact with the female by the name of "Hink" in the City of Virginia Beach on December 7, 1972.

Nichols was paid by the FBI for expenses and services in connection with the requests of Henry, and for the information furnished by Nichols.

I never requested anyone affiliated with the Norfolk City Jail to place Edward Benjamin Nichols in the same cell with Henry. I never sought to have Billy Gale Henry placed in the same cell with Nichols. I never contacted anyone in the Norfolk

City Jail, Portsmouth City Jail or U. S. Marshal's Office to have Henry lodged in a specific jail. I never interceded with anyone in the Norfolk City Police Department or Commonwealth Attorney's Office, Norfolk, on behalf of Nichols for information he furnished regarding Henry. I did not intercede on Nichols' behalf to have him released from the Norfolk City Jail. As I recall, Nichols was being released at this time because his jail time had been served. Again, I recall specifically telling Nichols not to question Billy Gale Henry regarding the bank robbery charge against him, however, if Henry was requesting Nichols' assistance and Henry was initiating the conversation about the bank robbery, Nichols was requested to report this information.

I never interviewed Joseph Sadler and never requested anyone at the Norfolk City Jail or Portsmouth City Jail to have Sadler and Henry placed in the same cell. I never requested anyone in the U. S. Marshal's Office, Norfolk, to have Henry placed in a specific jail or cell with Sadler.

/s/ Gerald T. Coughlin
GERALD T. COUGHLIN

Subscribed and sworn to before me this 13 day of September, 1977.

/s/ Andrea R. Coleman
Notary Public for
Norfolk, Virginia

My Commission Expires:
Mar. 8, 1981

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